

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)

Petitioner,)

v.)

RAYTHEON COMPANY,)

Respondent.)

MAR 28 1969

No. 22,572

INTERNATIONAL UNION OF ELECTRICAL,)
RADIO AND MACHINE WORKERS, AFL-CIO,)

Petitioner,)

v.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent,)

and)

RAYTHEON COMPANY,)

Intervenor.)

No. 22,572A

FILED

MAR 25 1969

WALL & WOLF, S.F.

On Petition for Enforcement and Petition To Review
an Order of the National Labor Relations Board

PETITION OF THE INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,
FOR RE-HEARING EN BANC

Irving Abramson

Ruth Weyand

Melvin Warshaw

1126 Sixteenth Street, N.W.

Washington, D.C. 20036

Attorneys for Petitioner

(i)

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

	<u>Page</u>
Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).....	6
Foreman & Clark, Inc., 215 F.2d 396 (CA 9, 1954).....	3
Furr's v. NLRB, 350 F.2d 84 (CA 10, 1965).....	4
General Engineering, Inc. v. NLRB, 311 F.2d 570 (9 Cir. 1962).....	2, 6, 8, 9
General Shoe Corporation, 77 NLRB 124 (1948)	3
NLRB v. Clark Bros. Co., 163 F.2d 373 (CA 2, 1947)	9
NLRB v. Crompton Highland Mills, 337 U.S. 217 (1949).....	9
NLRB v. Heck's, 369 F.2d 370 (CA 6, 1966).....	7
NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947)	6
NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109 (CA 7, 1963).....	8, 9
NLRB v. Metalab - Labcraft, 367 F.2d 471 (CA 4, 1966)	9
NLRB v. Mexia Textile Mills, 339 U.S. 563 (1950)	8, 9
NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938)	6, 9

	<u>Page</u>
NLRB v. Rippee, 339 F.2d 315 (CA 9, 1964)	9
NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649 (CA 4, 1955)	3
NLRB v. Toledo Deck & Furniture Co., 158 F.2d 426 (CA 6, 1946)	7
NLRB v. A. J. Towers Co., 329 U.S. 324 (1946)	3
NLRB v. Trimfit of California, 311 F.2d 206 (CA 9, 1954)	4
NLRB v. Waterman Steamship Corporation, 309 U.S. 206 (1940)	3
Pacemaker Corp. v. NLRB, 260 F.2d 880, (CA 7, 1953)	4
UAW v. Scofield, 382 U.S. 205 (1965).....	5
Surprenant Mfg. Co. v. Alpert, 318 F.2d 396 (CA 1, 1963)	4
Wirtz v. Local 153, Glass Blowers Ass'n., 389 U.S. 470 (1968).....	7

Statutes and Rules

National Labor Relations Act (29 USC Section 151 et seq.)	
Section 7	8
Section 8(a)(1).....	2, 3, 8
Section 10(a).....	5, 10
Section 11730.1 of the NLRB Field Manual, (July, 1967)	4

UNITED STATES COURT OF APPEALS

NATIONAL LABOR RELATIONS BOARD,)
)
 Petitioner,)
)
 v.) No. 22,572
)
 RAYTHEON COMPANY,)
)
 Respondent.)

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RAYTHEON COMPANY,

Intervenor.

On Petition for Enforcement and Petition To Review
an Order of the National Labor Relations Board

PETITION OF THE INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO,
FOR RE-HEARING EN BANC

The International Union of Electrical Radio and Machine Workers, AFL-CIO (herein called "IUE") respectfully petitions this Court to reconsider a decision entered herein on February 19, 1969. On the authority of the General Engineering, Inc. v. NLRB, 311 F.2d 570 (9 Cir. 1962), this Court (Judges Chambers, Koelsch and Browning) granted, per curiam, the Company's motion to dismiss the proceeding on the ground that the Board's order remedying various Section 8(a)(1) violations had become moot because a representation election was subsequently conducted.

The failure of the IUE to be selected as the exclusive collective bargaining representative in the subsequent election has nothing whatsoever to do with the Section 7 rights of the employees which the Board's order seeks to protect. The decision in this case and in General Engineering, Inc. v. NLRB, supra, was based upon the fact that during the intervening representation election the Company did not violate Section 8(a)(1) of the Act and the election was certified as validly conducted.

The question of election interference^{1/} is and was not before the Court despite the Board's finding that such interference also constituted independent unfair labor practice violations. The control of employee representation election proceedings are matters intrusted by Congress to the Board alone and not to the Courts NLRB v. Waterman Steamship Corporation, 309 U.S. 206, 226, 60 S.Ct. 493, 503. Just as interference in such election matters would constitute error by this Court, consideration

1/ Election interference is a factor for the Board to consider within its wide area of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. National Labor Relations Board v. A. J. Towers Co., 329 U.S. 324. Since election objections are considered in relation to the laboratory conditions that the Board requires for the conduct of a representation, that may not be equated with unfair labor practices even though the latter may or may not constitute the basis for invalidating an election. Foreman & Clark, Inc., 215 F.2d 396, 409 (C.A. 9, 1954) cert. denied 348 U.S. 887; NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649, 652, 653 (C.A. 4, 1955), cert. denied 350 U.S. 914; General Shoe Corporation, 77 NLRB 124, 126, 127. It is the commission of unfair labor practices which is before the Court for review and not the propriety of the election that was conducted after the Board issued its remedial order with respect to said unfair labor practices. Conduct that interferes with an election is completely separate and independent from conduct that violates Section 8(a)(1) of the Act and it is only the latter which is before this Court.

of the subsequently held election was also error since it infringes upon the Board's exclusive authority over the timing of elections Furr's v. NLRB, 350 F.2d 84, 85-86, (C.A. 10, 1965), Surprenant Mfg. Co. v. Alpert, 318 F.2d 396, 399 (C.A. 1, 1963); Pacemaker Corp. v. N.L.R.B., 260 F.2d 880, 882 (C.A. 7, 1953).

It is the Board's settled policy not to conduct representation elections during the pendency of unfair labor practice cases (N.L.R.B. v. Trimfit of California, 311 F.2d 206, 209 (C.A. 9, 1954)) unless the union requests an early election and agrees not to protest on the basis of unremedied unfair labor practices (Section 11730.1 of the NLRB Field Manual, July 1967). As the perpetrator of the unfair labor practices the employer cannot compel the union to proceed with an early election by withdrawing its pending charge (NLRB v. Trimfit of California, supra). The mootness result in this case improperly subjects the union to an election as between having the unfair labor practices remedied and having an early determination of representatives. In addition, the mootness result interferes with the Board's discretion in fixing the time and date of an election.

Assuming arguendo that IUE's willingness to go ahead with the subsequent election may also be deemed an "agreement" to

withdraw its pending charges, it could not affect the right of the Board to have its order enforced. Section 10(a) of the Act^{2/} expressly prohibits "any agreement" from affecting the Board's power to prevent any person from engaging in any unfair labor practice. Cf. UAW v. Scofield, 382 U.S. 205 (1965). Contrary to the Board's judgment that an order is necessary to bar the resumption of conduct violative of the Act in future elections, this Court substituted its own judgment and dismissed the unfair labor practice on its finding that enforcement would not effectuate the policies of the Act. It is submitted that the Court's judgment is in direct conflict with the Supreme Court's mandate that the fashioning of appropriate remedial orders is "peculiarly a matter for administrative competence" and a Board order may not be disturbed "unless it can fairly be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the

^{2/} Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Act." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964).

In NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 55 S.Ct. 571, the Supreme Court enforced a Board cease and desist order barring the company from recognizing a company union, where a subsequent Board election had already established another union as the recognized bargaining agent. In response to the suggestion that the case had become moot because the illegally recognized union had been validly replaced by a certified union, the Court said:

" . . . an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." (303 U.S. at 576)

The dictum in N.L.R.B. v. Jones & Laughlin Steel Corp., 331 U.S. 416, which is the predicate for the mootness conclusion in General Engineering is not to the contrary for it is the Board's view that statutory policy will be served by the enforcement of the order to prevent the "resumption of the unfair practices barred by an enforcement decree." N.L.R.B. v. Mexia Textile Mills, 339 U.S. 563, 567.

Compliance by an employer with a decision of the Board does not justify a refusal to issue a decree of enforcement (NLRB v. Toledo Deck & Furniture Co., 158 F.2d 426 (C.A. 6, 1946)) and is no defense against the entry of a decree of enforcement (N.L.R.B. v. Heck's, 369 F.2d 370 (C.A. 6, 1966)). It is well settled that a Board order imposes a continuing obligation and that the Board is entitled to effectively bar the resumption of the unfair labor practices by an enforcement decree NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 567 (1950); Cf. Wirtz v. Local 153, Glass Blowers Ass'n., 389 U.S. 470, 474-475, 88 S.Ct. 643, 649-650 (1968).

The IUE's commitment to serve as the bargaining representative of the Company's employees has not been affected by its election loss. Multiple election campaigns frequently precede the certification of a union as the exclusive bargaining representative and is more the rule than the exception. On this premise alone the Board's judgment that enforcement of its order is necessary to bar the repetition of the unlawful conduct in future elections is fully within the exercise of its administrative expertise and must be respected by this Court.

In our opening brief we pointed out that General Engineering Inc. v. NLRB, 311 F.2d 570 (C.A. 9, 1962), on which the panel in this case relied, is distinguishable since consideration was limited to whether the Board's order should be enforced because of the intervening election and not "as a means of insuring that in future elections the conduct may not be repeated" NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109, 111 (C.A. 7, 1963) cert. denied 377 U.S. 944. The error in General Engineering is in equating conduct violative of Section 8(a)(1) as simply election interference depending upon whether or not a second election is held. The willingness of the Company not to interfere with its employees' Section 7 rights may not be deemed as evidence that the Company stands ready, able and willing to comply with the law in future elections. Even assuming that somehow the second election may be deemed substantial compliance with the Board's order, it would not thereby become moot since such a result is foreclosed by NLRB v. Mexia Textile Mills, 339 U.S. 563, 70 S.Ct. 833, where the Court said:

"* * * the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from

an appropriate court. * * * A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. As the Court of Appeals for the Second Circuit remarked, 'no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear.' * * The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices." (pp. 567-568, 70 S.Ct. pp. 828-829.)

General Engineering, and the decision of the panel in this case, is also in direct conflict with this Circuit's decision in NLRB v. Rippee, 339 F.2d 315 (C.A. 9, 1964) which obeyed the decision in Mexia and Pennsylvania Greyhound, supra. See also NLRB v. Crompton Highland Mills, 337 U.S. 217, 225 (Note 7).

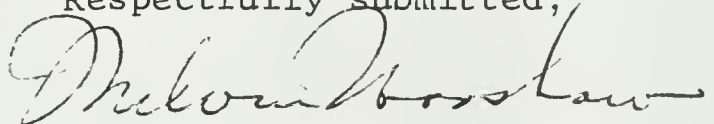
In every other Circuit that has had the occasion to consider the effect of an intervening election upon the Board's prior order that seeks to remedy unfair labor practice that occurred in an earlier election, the Board's order has been enforced and not found moot. NLRB v. Marsh Supermarket, Inc., supra, 327 F.2d at 111, which expressly disapproved General Engineering; NLRB v. Metalab - Labcraft, 367 F.2d 471, 472 (C.A. 4, 1966); NLRB v. Clark Bros. Co., 163 F.2d 373,

It is respectfully submitted that the Court's action in dismissing petitions herein is in direct conflict with applicable Supreme Court decisions and the powers of the Board as expressed in Section 10(a) of the Act. It is therefore requested that the Court reconsider its decision in this case and reject the contention that the intervening election has rendered the Board's order moot.

CONCLUSION

The IUE respectfully prays that this petition for re-hearing be granted and that, after such re-hearing, the Court withdraw its decision of February 19, 1969 and enter a new decision, on the merits, enforcing the Board's order in full and remanding the additional relief requested by the IUE to the Board for determination.

Respectfully submitted,



Irving Abramson
Ruth Weyand
Melvin Warshaw
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for International Union
of Electrical, Radio and Machine
Workers, AFL-CIO

Dated at Washington, D.C.

March 20, 1969.

